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October 31, 2023

Internal Revenue Service  
1111 Constitution Ave. N.W.  
Washington, D.C. 20224  
Via online submission

**Via electronic submission**

**RE: TEI Feedback/Questions F6765**

Dear Sir or Madam:

On September 15, 2023, the Internal Revenue Service (the “IRS”) released proposed changes to Form 6765, Credit for Increasing Research Activities (the “Proposed Form”) without accompanying form instructions. Form 6765 is used by taxpayers to claim the credit for increasing research activities and to elect the reduced tax credit under section 280C.<sup>1</sup> On behalf of Tax Executives Institute, Inc. (“TEI”), I am pleased to provide feedback on the Proposed Form.

**About TEI**

TEI was founded in 1944 to serve the needs of business tax professionals.<sup>2</sup> Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

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<sup>1</sup> All “section” references are to the Internal Revenue Code of 1986, as amended (the “Code”).

<sup>2</sup> TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Code.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to the proposed changes to Form 6765.

### TEI Comments

We appreciate the opportunity to provide comments on the proposed changes to Form 6765. At the outset, we acknowledge that the IRS is attempting to address concerns over a particular subset of credit claims, often found on amended returns. We understand that these claims have placed a significant burden on the IRS. In addition to the public reporting on research credit litigation, the IRS increased the requirements for filing an amended research credit claim with detailed information requests similar to those in the Proposed Form. While TEI does not necessarily agree with the increased requirements for amended return claims, we understand the burden such claims place on IRS examination resources and the IRS's corresponding need to limit the number of amended return credit claims. However, we do not believe that adding these burdensome requirements for original returns strikes the right balance between preventing certain taxpayers from claiming unwarranted credits and allowing the IRS to effectively administer the credit and encourage legitimate credit claims.

The vast majority of taxpayers who claim the credit, especially those who are independently audited (public reporting entities), are responsible taxpayers who comply diligently with the Code and regulations and make research credit claims on their original returns. The Proposed Form would apply to all taxpayers regardless of their diligent compliance with the Code and regulations. Critically, it will not improve the IRS's ability to detect faulty claims for case selection, but it will vastly increase the burden on compliant taxpayers. As described in more detail herein, the Proposed Form requests an extensive amount of information, including unstructured narratives, that is not always required by statute or regulations in order for a taxpayer to claim the credit on the original return. As a result, more taxpayers with legitimate credit claims will be unable to claim the credit. Thus, the Proposed Form will have the unintended consequence of

thwarting Congressional intent to incentivize R&D in the United States by making the research credit available, and it will do so while providing little value to the IRS in terms of additional information for case selection and other valid tax administration goals. Rather, the Proposed Form will discourage additional domestic research activities or give U.S. multinationals reasons to move research overseas, undermining the express purpose for the credit.

### **General Comments**

Unreasonable workload and burden. The proposed changes to Form 6765 would create an overwhelming workload for and impose an unreasonable burden on taxpayers conducting significant research activities that claim the credit for numerous research projects. TEI member taxpayers engage in a significant number of research projects every year (a number that could be in the thousands for some taxpayers) and each of which involves developing a new or improved business component. The effort required by such taxpayers to identify, obtain, and organize the necessary documentation and prepare the form for 5,000 or 10,000 discrete business components, for instance, and to summarize the research performed and alternatives evaluated during the process of experimentation for each of those components would result in substantial and unreasonable compliance costs, inevitably totaling thousands of labor hours. For example, if one were to allow 30 minutes to obtain and summarize the information requested in line 50(d) for each business component (a very conservative estimate, given the complexity of most research efforts), a taxpayer with 10,000 research projects would need 5,000 labor hours to complete just this one form. That totals an unreasonable 625 workdays for one employee. Even if one reduces the estimate of the preparation time to an unrealistically low estimate of 10 minutes per project, it would require 1,667 hours of work. Thus, the proposed changes will make it inordinately more difficult and costly for taxpayers that perform extensive research in various areas to claim the credit. Our members report that providing useful and meaningful descriptions of just a single project during audits often requires extensive narratives.

The Proposed Changes Will Not Increase Compliance or Ease Case Selection. The IRS's stated objectives for the proposed changes include "helping taxpayers meet their obligations and using enhanced data and analytics to operate more efficiently and select the highest risk cases." However, the Proposed Form does not explain how it is supposed to aid taxpayers in meeting their tax

obligations, and the overwhelming compliance burden imposed by the changes on large taxpayers far outweighs any informational benefits those changes could conceivably have.

The changes to the form also will not yield information of appreciable value to the IRS. To the best of our knowledge, the IRS presently has no mechanism to evaluate the volume of information it is requesting to risk assess returns. The information is not useful for risk assessment, as one cannot form a reasoned initial judgment about the risk with respect to, or qualification of, complex, inventive projects, from a brief description of the work. Obtaining the names of thousands of projects and a highly simplified description of each will be of little value to the IRS. Any effort to make audit selections based on brief descriptions will invariably omit some weaker activities and focus time on projects that actually are very low risk.<sup>3</sup> Thus, the information sought is insufficient to allow IRS personnel to make meaningful judgments.<sup>4</sup>

Compliance with the Paperwork Reduction Act. The Paperwork Reduction Act ("PRA") applies to the Department of the Treasury and the IRS. As explained in Treasury Directive 80-06, the PRA

was enacted to ensure that agencies do not overburden the public with federally-sponsored collections of information, by mandating that agencies minimize the information management burden that they place on the public. The PRA generally requires that no agency collect information from the public without notice and public comment and prior approval of the Office of Management and Budget (OMB). The PRA also requires agencies to report to Congress annually on

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<sup>3</sup> The Proposed Form does not take into account the complexity and challenges of modern research. On audit, similar concerns have arisen around determinations based on brief project descriptions that should be avoided at the tax return stage as well.

<sup>4</sup> Increasing the amount of information requested will not solve this problem. Not only would doing so further increase the burden on taxpayers, but it also would result in thousands of pages of return information from research intensive corporations that would increase the burden on the IRS as well.





describe the information sought to be discovered and the identification of alternatives evaluated during the process of experimentation for every single business component, would effectively prohibit the use of sampling, as sampling does not require the identification of that information for every project. The proposed revisions fail to consider that and offer no guidance for taxpayers that use valid statistical samples to calculate the credit. Such taxpayers would not be expected to have much of the information requested for business components not drawn in the sample, and, therefore, under the Proposed Form, would not be able to qualify those non-sampled projects.<sup>12</sup>

Other Legal Issues. The IRS also has not considered a number of other legal issues. For example, lines 51-53 ask for information that seeks to separate research activities that constitute direct research from those that represent direct support or supervision of research. Those questions seem to indicate that the IRS views direct research as somehow different from direct supervision and direct support of research. The statute and regulations do not allow such a distinction, and the U.S. Court of Appeals for the Seventh Circuit has ruled that such a distinction has no basis in the law.<sup>13</sup> Taxpayers should not be asked for information that does not affect their qualification for the credit and that the law would therefore not require them to keep. At the very least, any changes to the form would need to make accommodation for the rule under *Golsen v. Commissioner*<sup>14</sup> and exempt taxpayers within the Seventh Circuit from completing those questions, since that is not information they must maintain.

Another legal concern is that some of the research performed by large taxpayers is classified or restricted for national security reasons. Those projects have strict rules about the disclosure of information that could make it difficult, if

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2017 WL 3404758, \*2 (Aug. 9, 2017) (permitting the use of a sample at trial in a research credit case over the government's objections and citing IRS Field Directive On The Use of Sampling Methodologies in Research Credit Cases).

<sup>12</sup> We are aware of recent audits in which the IRS has asserted that statistical sampling is not allowed for the research credit, but the IRS has cited no authority for that proposition, and it is inconsistent with judicial precedent. A decision to exclude sampling for the research credit should only come about through the official guidance process that provides notice to taxpayers and an opportunity to comment.

<sup>13</sup> *Little Sandy Coal v. Comm'r*, 62 F.4th 287 (7th Cir. 2023).

<sup>14</sup> 54 T.C. 742 (1970).

not impossible, for the taxpayer to provide information about classified or restricted business components on a tax return without violating the law. Even if it were permissible to provide the information, it would be visible to a wide variety of IRS personnel, many (if not most) of whom would lack the necessary security clearances to view the information. The proposed changes do not take into account these considerations and thus penalize research in the national security and defense sectors, exactly the type of work Congress would want to incentivize in these fraught times.<sup>15</sup>

Issues with the Proposed Form's Current Design. The Proposed Form greatly oversimplifies the research credit process, ignores that every taxpayer and project is different, and tries to force complex concepts into deceptively simple drop-down menus. The Proposed Form ignores the difference between what a taxpayer should be able to support from its files and other information sources (including testimony) during an audit and what is needed to prepare and file a return. The information requests added in Section E – Other Information and Section F – Business Component Information are more consistent with an Information Disclosure Request during audit and should be kept to that process.

Within the past few years, the IRS has received feedback from taxpayers and practitioners about the process undertaken to update other important forms, such as with the proposed revisions to schedule K-1 and the creation of new schedules K-2 and K-3. Those experiences illustrate the challenges of a process that does not include preliminary input from taxpayers and the benefits of a more collaborative approach. Additionally, the instructions are needed in order for taxpayers to be able to meaningfully and fully comment on forms, so the IRS should provide the instructions and engage with taxpayers thereafter before finalizing a new Form 6765.

CAP Taxpayers. TEI requests that taxpayers participating in the IRS Compliance Assurance Process (“CAP”) be excluded from the requirement to file an updated Form 6765 as they already provide extensive R&D information and support for the credit to IRS CAP teams in advance of filing their tax returns.

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<sup>15</sup> Some of the information requested also may be proprietary and subject to privacy concerns; for example, information regarding competitive advantages, pricing, new products, and patent requests, among other things.



### Comments on Specific Lines

46: It is not clear which “officers’ wages” should be included. Different businesses use different terms to identify “officers” or executives. Therefore, a definition for officer should be added.

47: It is not clear what the IRS deems to be a “major portion” of a trade or business. This term is open to interpretation and should be clarified.

48: The term “new categories of expenditures” also may be open to different interpretations. For example, if you don’t have a specific category of expenditure in the current year but have had it in the past, is it considered “new” the next time you have it again? This term should be clarified as well.

50-57: These lines only allow for the reporting of 10 business components. Although the Proposed Form does indicate that taxpayers should look to the instructions if there are more than 10 business components, it is unclear currently what the instructions will provide. The instructions should allow additional business components to be included through an attachment.

50(c): Not every taxpayer gives business components names (descriptive or otherwise), and there is no statutory requirement that they do so. Thus, asking for such information is improper. Moreover, such information is not useful in determining if a particular project qualifies, or even if it should be viewed as low, medium, or high risk.

50(d): This section will not provide information from which anyone at the IRS can meaningfully evaluate the project and decide if it requires examination. Furthermore, the space allotted is not sufficient to provide the information regarding alternatives evaluated in the process of experimentation; the information requested would result in pages of detail, far beyond what is required for any other tax form. Requiring this level of description would increase the burden on taxpayers exponentially and make it even more administratively difficult for the IRS to evaluate the thousands of returns on which the credit is claimed.

50(e): The same rules apply for new and improved business components under the law, so there is no requirement that a taxpayer keep information about

the category of a particular project. Furthermore, the IRS does not have use for such information.

50(f): The drop-down list does not allow proper classification of projects; for example, there are business components that are products, software, and inventions, as well as combined hardware and software. One cannot choose a single word to describe an effort when three or four choices apply. Moreover, the same basic rules apply to all types of products, software, and inventions, so the distinction does not provide useful information (except perhaps for possible IUS).

50(g): Again, a drop-down list does not work in this context. For example, there are components that are intended for non-G&A use in the taxpayer's own business and also for sale, lease, or license to customers.

50(h): The IUS drop-down is unduly complex and unreasonable – there could be software that may or may not be IUS; no taxpayer in that circumstance will label it as IUS and thus be taken to have made an admission. As long as there is a good faith basis for concluding that a project is not-IUS, that will likely be the option selected. Therefore, this request will give the IRS little useful information. If this box is retained, we recommend reducing the number of categories to the following: IUS, Dual Function Software, Non-IUS, and Excepted from IUS Treatment.

51-53: As noted above, after the decision in *Little Sandy Coal* in the Seventh Circuit, these three categories of research have been treated the same, so there is no basis in the law to require a taxpayer to keep this information and report it.

### TEI Request

Given the substantial concerns outlined above, TEI requests that the IRS postpone implementation of the Proposed Form and instead directly engage with taxpayers about how to report the research credit in a way that is workable for taxpayers and that provides the information value to the IRS that underlies these form changes, such as expressly adopting statistical sampling as an option for credit reporting purposes. TEI would be pleased to participate in such conversations and can offer varied perspectives from a wide variety of corporate taxpayers across industries.

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TEI appreciates the opportunity to provide feedback on the proposed changes to Form 6765. TEI's comments were prepared under the aegis of its Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact TEI Tax Counsel Kelly Madigan at 202.470.3600 or at [kmadigan@tei.org](mailto:kmadigan@tei.org).

Respectfully submitted,

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